



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 14, 1996

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Comptroller of Public Accounts
111 East 17th Street
LBJ State Building
Austin, Texas 78774

OR96-2122

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102404.

The Comptroller of Public Accounts (the "comptroller") received a request from an attorney for "any and all documents related to the investigation, survey, or other inquiry from January, 1995 through the present concerning Mr. [Jacob] Salisbury and any allegations of alleged sexual harassment, poor management skills and judgment as manager of the Local Assistance Division, and/or his alleged failure to maintain proper communications with the employees in his division." You assert that much of the requested information is excepted from required public disclosure under sections 552.101, 552.103, and 552.117 of the Government Code.¹

We first address your assertion that section 552.103, the "litigation exception," excepts the requested information from required public disclosure. When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish (1) that litigation is

¹You initially raised section 552.107 of the Government Code as an additional exception to disclosure. However, as you have not explained how section 552.107 applies to the requested information, we conclude that you have waived this exception. See Gov't Code § 552.301(b)(1).

either pending or reasonably anticipated and (2) that the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You assert that litigation is reasonably anticipated because the requestor has "demand[ed] that Mr. Salisbury's 'salary, benefits and a management position be reinstated, with back pay, to the effective date of the adverse disciplinary action.'"

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision Nos. 555 (1990), 346 (1982) (attorney's threat to take "further legal action" if disputed payments not made promptly sufficient to establish litigation realistically contemplated). On the other hand, this office has determined that where an individual hires an attorney who alleges damages but makes no specific threat to sue, litigation is not reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. In this instance, although the attorney has made certain demands upon the comptroller, he has made no threat to sue. The mere chance of litigation is not sufficient to warrant withholding of information. Open Records Decision Nos. 183 (1978), 139 (1976). Consequently, we conclude that the comptroller may not rely on section 552.103 to withhold any of the requested information.

You also assert that certain information must be withheld under section 552.101 in conjunction with the common-law right to privacy. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception applies to information made confidential by the common-law right to privacy. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person and (2) the information is of no legitimate concern to the public. *Id.* We agree that the personal and medical information you have marked in enclosure #3 and all of enclosure #10 is highly intimate and embarrassing and of no legitimate concern to the public and, therefore, must be withheld under section 552.101 of the Government Code.

You also assert that the names of the complainant of the alleged sexual harassment and the witnesses, their detailed statements, and information that would tend to identify the complainant and the witnesses must be withheld under section 552.101 in accordance with the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso, 1992, writ denied).

In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

You suggest that release of the investigation report (enclosure #5) itself would satisfy "the public's legitimate interest in the events at issue." However, in the situation at hand, the investigation involved Mr. Salisbury's job performance in addition to the alleged sexual harassment. The common-law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. See Open Records Decision Nos. 438 (1986), 219 (1978), 230 (1979). We have marked the portion of the representative sample² of the witness investigation files (enclosure #6),³ the entire witness list (enclosure #7), the portion of the summary of the witnesses' statements (enclosure #8), the portion of the employee leave comparison (enclosure #9), and the portion of the transfer list (enclosure #11) which reveals or tends to reveal the identity of the complainant and witnesses, the details of their statements as they pertain to the alleged sexual harassment, or otherwise violates an individual's common-law right to privacy. The comptroller must withhold this information under section 552.101 of the Government Code and the common-law right to privacy. However, the remainder of the information in these enclosures, with the exception of certain information in the transfer list (enclosure #11), discussed below, pertains to the investigation of Mr. Salisbury's job performance and must be released to the requestor. In addition, the investigation report (enclosure #5) must be released in its entirety.

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³We note that, although not addressed in your letter, enclosure #4 appears to be a witness investigation file similar to enclosure #6. We have not marked enclosure #4 but, rather, have marked information in enclosure #6 as representative of the information in the witness investigation files which must be withheld under section 552.101 and the common-law right to privacy. In addition, with regard to certain information contained in the witness investigation files, you claim that "information dealing with ordinary business activity . . . may be excepted from disclosure only by §552.103." However, as the information tends to identify the witness to whom the file corresponds, we believe that this information must also be withheld under section 552.101 and the common-law right to privacy.

Finally, with respect to the transfer list (enclosure #11), you assert that several employees on this list have elected to keep certain information confidential pursuant to section 552.024 of the Government Code which, therefore, must be withheld under section 552.117.⁴ Section 552.117 excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 at the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.⁵

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

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⁴Several of these employees' names and identifying information, such as social security numbers, already must be withheld under section 552.101 and the common-law right to privacy.

⁵Regardless of whether any given employee made the election permitted under section 552.024, federal law may prohibit disclosure of an employee's social security number. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

Ref.: ID# 102404

Enclosures: Marked documents

cc: Mr. Thomas G. Tucker
Sutherland, Asbill & Brennan
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(w/o enclosures)